

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

DOWNEY UNIFIED SCHOOL DISTRICT,

OAH Case Nos. 2011050579 (Primary Case) and 2010100321

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DOWNEY UNIFIED SCHOOL DISTRICT,

OAH Case No. 2011030557

v.

PARENT ON BEHALF OF STUDENT.

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**DECISION ON REMAND**

On October 6, 2010, and May 12, 2011, Parent on behalf of Student filed Requests for Due Process Hearing (complaints) naming the Downey Unified School District. Downey filed a complaint naming Student on March 9, 2011. The Office of Administrative Hearings consolidated the matters on May 20, 2011. The hearing took place before Administrative Law Judge Darrell Lepkowsky on October 24 – 27, 2011. On December 21, 2011, OAH issued a decision in this matter, finding for Student on three issues presented and for Downey on 16 issues (first decision).

Student filed an appeal of the first decision in the United States District Court for the Central District of California, entitled *J.L., et al. v. Downey Unified School District*, Case No. CV-12-2285GW (SSx). The District Court, the Honorable George H. Wu presiding, issued a tentative ruling on September 27, 2012, finding, inter alia, that contrary to the OAH decision, Student's mother had given consent to assessments and to portions of Student's individualized educational programs through correspondence from her attorney to Downey. On January 14, 2015, the District Court issued its final order remanding the case to OAH for further proceedings consistent with the District Court's decision.

OAH held telephonic status conferences with the parties to discuss the remand on February 6 and 13, 2015, as well as a prehearing conference on April 20, 2015, to clarify the issues for hearing on remand.

The hearing on remand was held before ALJ Lepkowsky on April 28, 29, and 30, 2015, in Downey, California.

Patricia Valenzuela and Lauren-Ashley Caron, Attorneys at Law, represented Student. Student's mother was present each day of the hearing. Student did not attend.

Karen Gilyard, Attorney at Law, represented Downey. She was accompanied at times by attorneys Brianna Hill and Gabrielle Ortiz. Nancy Matthews, Program Administrator for Special Education, attended the hearing each day on behalf of Downey.

The ALJ granted the parties' request to file written closing arguments, and the record remained open until June 1, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

#### ISSUES ON REMAND<sup>1</sup>

##### Student's Issues:

1. Did Downey deny Student a free appropriate public education by failing to implement the speech and language services and goals and objectives from its March 12, 2010 and September 21, 2010 IEP offers, even after Student's mother gave consent to implementation of those portions of the IEP's?

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<sup>1</sup> At the beginning of the hearing on remand, the parties submitted a stipulation, marked and entered into evidence as Joint Exhibit 1. In their stipulation, the parties identify the portions of the individualized education plans to which Student's mother consented, when she gave consent, if and when Downey ever implemented the provisions, and if and when Downey ever provided assessments it had proposed in a series of assessment plans. In its closing brief, Downey conceded that the consent of Student's mother to those portions of the IEP's was clear and unambiguous. In light of the stipulation and Downey's concession, the ALJ has rephrased the issues for purposes of clarifying the underlying remaining disputes between the parties pursuant to the District Court's remand. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

At the beginning of the hearing on remand, Student withdrew his issues regarding Downey's delay and/or failure to assess him in the areas of occupational therapy and adaptive behavior.

2. Did Downey deny Student a FAPE by delaying its administration of the psycho-educational<sup>2</sup> and speech and language assessments proposed in its March 22, 2010 and November 23, 2010 assessment plans?

3. Did Downey deny Student a FAPE by its continuing failure to assess Student in the areas of functional behavior, motor performance/physical fitness, and/or audiology as proposed in Downey's March 22, 2010, and/or November 23, 2010 and May 6, 2011 assessment plans?

Downey's Issue:

4. Was Downey unable to implement the portions of Student's March 12, 2010 and September 21, 2010 individualized educational programs to which Student's mother consented given the limited scope of her consent?

### SUMMARY OF DECISION

The issues on remand in this case concern Downey's offer of placement and services to Student in a series of IEP team meetings held during 2010 in February, March, and September, as well as Downey's offer to provide Student psycho-educational, speech and language, functional behavior, audiology, and motor performance/physical fitness assessments in March and November of 2010, and May 2011. The United States District Court determined that Student consented to those assessments and IEP's through his attorneys' letters. The District Court remanded the matter to OAH to determine whether that consent was ambiguous, whether there was a denial of a free appropriate public education in light of that consent, and what the appropriate remedy should be for any denial of FAPE.

As discussed below, the consent by Student's mother through her attorneys to portions of the IEP offers was clear and unambiguous, as was her consent to the assessments at issue. The two portions of the IEP's which Student contends were not implemented were the goals and the revised speech and language services. Downey showed by a preponderance of the evidence that it could not have implemented the instructional goals in the IEP's to which Student's mother consented because implementation of the goals needed to be overseen by a special education teacher and Student's mother did not consent to moving Student from a general education classroom to a special day class. Alternatively, even if Downey had been able to implement the goals, Student failed to provide any evidence of any specific losses he suffered by the failure to implement and has failed to demonstrate his need

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<sup>2</sup> In Joint Exhibit 1, the parties refer to the psycho-educational assessment as one which assessed the area of social-emotional. However, since both parties refer to the assessment as psycho-educational in their closing briefs, which is how it is identified in the Prehearing Conference Order, that is how it will be discussed in this Decision, although only the social/emotional portion of that assessment is at issue on remand.

for compensatory education. Downey does not contend that it could not have implemented the five additional minutes per week of speech and language services it offered. However, Student has failed to demonstrate that the failure to implement the small additional amount of speech and language services to which Student's mother consented amounted to a material failure to implement the IEP's.

With regard to the assessments at issue, Downey eventually administered psycho-educational and speech and language assessments to Student as part of his triennial assessment in February and March 2013. Student has failed to demonstrate that he suffered any loss of educational benefit based on Downey's delay in assessing him in those two areas or that his mother's ability to participate in the IEP process was significantly impeded. However, Downey has never administered assessments in the areas of motor performance, audiology, autistic-like behavior, or functional behavior. Student met his burden of demonstrating that he may have potential unique needs in those areas of suspected disability. Even Downey acknowledged the need for assessment in these areas by seeking and obtaining an order from OAH permitting it to assess in these areas without parental consent. Student's mother's ability to participate in the IEP process was significantly impeded because she has never been informed of the extent of Student's needs, and was never given an opportunity to discuss those needs in an IEP team meeting. As a remedy, Student is entitled to independent educational evaluations at Downey's expense in the four areas in which Downey has failed to provide assessments. Downey shall also fund up to two hours' time for each independent assessor to attend an IEP team meeting to discuss the results of his or her assessment with Student's IEP team.

## FACTUAL FINDINGS

### *Background*

1. At the time of the initial due process hearing, Student was a seven-year-old boy who was in second grade. At the time of the hearing on remand, Student was ten years old and in fifth grade. Student lived within Downey's boundaries at all times pertinent to both hearings. Although first determined to be eligible for special education and related services as speech and language impaired, at the time of the hearing on remand, Student's eligibility was solely under the category of other health impairment.

2. Student was a client of the South Central Los Angeles Regional Center prior to enrolling in Downey just before he turned three years old. The Regional Center had diagnosed Student with mixed receptive-expressive language disorder and provided him with speech and language services. At the time, his parents' primary concerns were Student's speech deficits. Downey administered psycho-educational and speech and language assessments to Student in November 2007. The results of the psycho-educational assessment indicated that Student's social/emotional skills were developing normally. Student had no developmental delays or signs of autism.

3. The results of the speech and language assessment indicated that Student had moderately delayed receptive language, articulation, and phonological skills. Student demonstrated moderate to severe deficits in expressive language skills. As a result of Student's speech and language deficits, Student's IEP team developed two speech goals for him at his initial IEP team meeting that convened on February 19, 2008. Downey offered Student two, 50-minute sessions a week of speech and language therapy to address his speech goals.

4. Downey convened an annual IEP team meeting for Student on June 15, 2009. Student was still pre-school aged, but would begin attending Kindergarten in the fall of 2009. Although Student's communication skills were improving, he still evidenced speech and language deficits. Downey therefore offered Student two, 20-minute sessions of speech and language therapy ~~a~~per week. Downey offered Student placement in a general education Kindergarten classroom. Student's mother signed her consent to this IEP offer on the date of the IEP team meeting.

#### *2009-2010 School Year: Kindergarten*

5. Student began attending Kristy Overturf's Kindergarten class in September 2009. Ms. Overturf often had difficulty understanding Student's speech. Student's academics were below grade level. He also demonstrated disruptive behavior in class that was distracting to his classmates. Based on concerns about Student's behavior, his parents requested that Downey administer a psycho-educational assessment. Downey agreed to assess Student in the areas of cognitive and learning potential, academics, adaptive behavior, and social/emotional development.

6. School psychologist Wendy Carey<sup>3</sup> administered the psycho-educational evaluation to Student. Her findings are discussed in a report dated November 12, 2009.

7. Ms. Carey's assessment consisted of interviews with Ms. Overturf, observations of Student in his classroom setting and during assessments, administration of several standardized testing instruments, and the completion of rating scales by Student's mother as well as by Ms. Overturf. The results of Ms. Carey's assessment indicated that Student was often inattentive in class, worked better in a one-to-one situation rather than in a group, had difficulty focusing, and needed constant redirection. Student also often would bump into his classmates, and was disruptive in class. The results of the assessments indicated that Student's cognitive abilities fell in the low average to average range.

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<sup>3</sup> Ms. Carey has a master's of science degree in school psychology, obtained her pupil personnel services credential as a school psychologist in 1997, and was licensed as an educational psychologist in 2004. She has worked as a school psychologist since 1997 and has been employed with the District since 2008.

8. The rating scales completed by Student's mother measured his overall adaptive functioning skills. Student's mother rated him as "adequate" in all but his communication skills, where she rated him as moderately low. Student's overall adaptive functioning was also classified as "adequate."

9. The rating scales Ms. Overturf completed addressed Student's social and emotional functioning at school. Ms. Overturf scored Student in the clinically significant range in several areas and in the at-risk range in several other areas. Ms. Overturf also completed a rating scale which screens for emotional and behavioral disorders in young children. Her ratings indicated that Student demonstrated symptoms of attention deficit hyperactivity disorder often enough to warrant concern. Student also demonstrated a high probability of oppositional defiant disorder.

10. Ms. Carey recommended that Student be found eligible as other health impaired due to his deficits in attention. Based on the results of her observations of Student, Ms. Carey determined that Student did not demonstrate characteristics associated with a finding of autism.

11. Student's mother obtained legal counsel at about the same time that Ms. Carey was assessing Student. In a letter to Downey dated November 20, 2009, counsel for Student's mother instructed that other than routine notices from the school on matters such as an open house or school plays, or if Student had an emergency medical condition, any written and oral communication concerning Student, including but not limited to evaluations, assessments, IEP's, placement, and even report cards, were to be directed to the law firm and not to Student's mother.

12. Student's parents also requested Downey to administer another speech and language assessment to him. Downey agreed to do the assessment, which was completed by speech and language pathologist Carey Smith in February 2010.<sup>4</sup>

13. Ms. Smith's assessment consisted of reviewing Student's records, observing him twice in his classroom, and administering several standardized speech and language tests. Ms. Smith observed that Student spoke at an appropriate rate and volume for his age and gender. However, he struggled with morphology and word endings such as "ed" and "ing." The results of the standardized tests indicated that there was a significant discrepancy between Student's receptive and expressive language, with his deficits being primarily in expressive language. Based upon Student's difficulty with expressive language, Ms. Smith recommended that he continue to receive speech and language therapy.

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<sup>4</sup> Ms. Smith has a master's of science degree in speech-language pathology, is certified as a speech and language pathologist in California, and has her national certificate of clinical competency. She works for a non-public agency that has a contract with Downey.

FEBRUARY 10, 2010 AND MARCH 12, 2010 IEP TEAM MEETINGS AND MARCH 22, 2010  
ASSESSMENT PLAN

14. Downey convened an annual IEP team meeting for Student on February 10, 2010, which concluded on March 12, 2010.<sup>5</sup> Student's parents were concerned that Student was manifesting indications of autism, but Ms. Carey informed them that his behaviors were indicative of the combined type of attention deficit hyperactivity disorder. The IEP team agreed to add other health impaired as the primary eligibility category for Student, with speech and language impairment as the secondary eligibility.

15. Based upon the result of Ms. Smith's assessment and her belief that Student might benefit from shorter speech and language therapy sessions due to his short attention span, Downey's offer of speech and language therapy was for three, 15-minute sessions per week rather than the two, 20-minute sessions per week Student was presently receiving. This amounted to an additional five minutes a week of services.

16. After determining Student's present levels of performance, his IEP team developed eight goals for him in the areas of academics, pre-vocational and vocational skills, and language and communication.

17. Based upon the results of Student's assessments, the difficulties he was having in his general education Kindergarten class, and his overall lack of progress, the Downey IEP team members believed that Student was not benefiting from his education. They therefore proposed that Student move to a special day class Kindergarten where he would be able to receive individualized instruction.

18. At the end of the February 10, 2010 IEP team meeting, Downey offered the following placement and services: a) placement in a highly structured, language-based special day class, first in Kindergarten and, for the following school year, in a similar first grade class; b) speech and language therapy, three times a week for 15 minutes each session in a small group setting; c) participation in the extended school year program for special education students; and d) transportation to and from school if Student attended the special day class, which was not located at his home school.

19. The IEP team meeting continued on March 12, 2010. The team revised Student's speech and language goals, including adding an additional goal.

20. Student's mother had several additional concerns about him. She was concerned about Student's gross motor skills because he bumped into things when he walked, fell down a lot, and could not dress himself properly. Student also did not seem like

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<sup>5</sup> For ease of description, these two IEP team meetings are referred to herein as the "March 12, 2010 IEP."

other children when he played. It appeared as if his feet were weighed down with something. She was concerned about Student's coordination. Student did not appear to be speaking correctly. He did not appear to be able to express himself and his pronunciation was bad. Student's mother was also concerned about Student's hearing because he was sometimes irritated by songs or noises. Also, Student sometimes did not respond to speech if his back was turned to the speaker. Student's mother also thought that he might be on the autism spectrum because he did not play well with other children, other than his brother, threw tantrums, and lashed out.

21. As of the date of the hearing on remand, Student continued to demonstrate sensitivity to noise and loud sounds, such as squeaking on a chalkboard or music being played loudly. His instructional aide, some of his teachers, and his specialized academic instruction teacher all agreed that Student sometimes appeared sensitive to loud talking or jarring sounds. As of the hearing on remand, Student continued to have an unusual gait, could not run properly, often walked with his hands along the walls, had poor coordination, and had trouble jumping. Student continued to be highly anxious at school, gave up easily on tasks, was easily frustrated, and did not make friends.

22. Based upon the concerns of Student's mother, Student's legal representatives requested numerous additional assessments in a variety of areas at the March 12, 2010 IEP team meeting. Downey IEP team reserved replying to the request until the team had time to review it.

23. Student's legal representatives requested that Downey provide Student with counseling to address his behavior issues in class. Downey IEP team members rejected the request because Student was not demonstrating any behavioral issues that required counseling.

24. Student did not put on any evidence at the first hearing to support his contention that he required counseling at school to access his education. At the hearing on remand, the only evidence that Student put on him in support of his contention that he requires counseling was his mother's testimony. Student's mother is not an educator, behaviorist, or psychologist. None of the evidence in this case indicated that Student required counseling to make meaningful educational progress.

25. Student's IEP team developed goals for him in the areas of segmenting the sounds of words, identifying and producing rhyming words, the proper writing techniques, number identification and counting, and functional skills, such as stating his name. The goals were designed to be implemented in a classroom setting by a special education teacher and/or trained paraprofessional who would be under the supervision of a special education teacher.



26. Student's IEP team also developed speech and language goals for him to improve his speech clarity, improve his use of morphological markers, and improve his understanding of spacial and qualitative concepts. The speech and language goals were designed to be implemented in the classroom or speech room by the speech and language pathologist.

27. Other than the revision of Student's speech and language goals, Downey's offer of placement and services remained the same as that offered at the February 10, 2010 IEP team meeting.

28. In a letter dated March 15, 2010, Student's attorney wrote to Downey's attorney, accepting on behalf of Student's mother Downey's description of Student's disabling conditions, Downey's offer of speech and language services of three, 15-minute sessions per week, and all proposed goals. The language of the letter was clear, unambiguous, and unequivocal. Based upon the decision of the District Court remanding this case to OAH, this letter constituted consent by Student's mother to those provisions of Downey's IEP offer that she was accepting.

29. Student's mother did not consent to Downey's offer of a special day class placement. Student remained in his general education Kindergarten class as that was his stay put placement.

30. On March 22, 2010, Julie Helm,<sup>6</sup> then the Program Administrator for Downey, who had been present at the two IEP team meetings, sent a letter to Student's attorney agreeing on behalf of Downey to conduct some of the assessments Student's parents had requested. Downey agreed to conduct assessments in the following areas: a) two additional subtests of the Test of Language Development: Primary, Fourth Edition, which Ms. Smith had utilized as one of the standardized testing instruments to assess Student's speech and language needs; b) social and emotional; c) psycho-motor development and perception, which would look at Student's occupational therapy needs; d) motor performance physical/fitness, which would address Student's potential need for adaptive physical education; e) a functional behavior assessment; f) additional assessments to determine whether Student was demonstrating any autistic-like behaviors that would support eligibility in that area. Downey declined to conduct assessments of Student's vision and hearing because its nursing staff had recently assessed Student in those areas and determined that Student had no vision or hearing deficits.

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<sup>6</sup> Ms. Helm worked 31 years for the District before retiring at the end of the 2009-2010 school year. She worked first as a special education teacher, then as an elementary school vice-principal and finally as a program specialist. In addition to her teaching credentials and administrative services credential, Ms. Helm has a master's degree from California State University-Los Angeles.

31. On March 25, 2010, Student's mother, through a letter from her attorney to Downey, unequivocally consented to the assessment plan.

32. Because neither Student's mother nor her attorney would sign the March 12, 2010 IEP document or the March 22, 2010 assessment plan, Downey did not believe Student's mother had consented to either the IEP or the assessment plan. Downey did not implement those portions of the IEP to which Student's mother had consented, in particular, the goals and the revised speech and language services.

33. As discussed below in further detail, Downey did not assess Student again in the areas of speech and language or social/emotional development until it administered a triennial assessment to Student in February and March of 2013. As of the date of the hearing on remand, Downey had not administered the assessments to Student in the areas of motor performance/physical fitness, functional behavior, or autistic-like behaviors. As discussed below, Downey also later offered to administer an assessment in audiology which, as of the date of the hearing on remand, it also had never done.

34. Student remained in Ms. Overturf's general education Kindergarten class throughout the remainder of the 2009-2010 school year as part of his stay put placement. The only goals in Student's June 15, 2009 IEP Downey continued to implement addressed the area of speech and language. Downey did not specifically implement the instructional goals that Student's mother had consented in March 2010. Therefore, Student's education was based on the grade level standards addressed by Ms. Overturf with all of her pupils. Among other subjects, Student received instruction in mathematics, English language arts, and reading. However, Student did not receive special education instruction because Student's mother had not consented to that portion of the proposed IEP. Student made very little progress in his general education classroom by the end of Kindergarten.

35. Student contends that Downey failed to implement his IEP goals to which his mother had consented. Ms. Helm did not believe that Downey could have implemented Student's March 12, 2010 IEP in a general education classroom because the goals were directed toward teaching Student either individually or in a small group. She did not believe that such specialized goals could be accomplished in a general education setting where the general education teacher had to concentrate on instructing a classroom of some 25 to 30 young children.

36. Although Ms. Overturf testified that she would have been able to instruct Student in the areas covered by the goals, Ms. Helm's testimony was more persuasive that the goals could only have been implemented by a special education teacher. Student's lack of progress in Kindergarten indicates that at the time, he required a structured environment, more adult support, and individualized instruction that was not available in a general education Kindergarten class where the general education teacher was responsible for instructing 25 to 30 pupils. Student's undisputed distractibility, anxiety, lack of focus, and lack of progress all support Downey's position that the goals could not have been implemented in the general education setting. Additionally, general education teachers

would not have had the experience, training, or time to implement the goals in their classrooms of 25 to 30 pupils. Further, as discussed below, even after Downey offered Student a primarily general education placement in his May 2011 IEP, Student's academic goals were all implemented by a special education teacher providing specialized academic instruction in reading, writing, and mathematics to Student either separately in his general education classroom or by removing Student to a separate classroom. It was only after Student began receiving the specialized academic instruction from a special education teacher that he began to make great strides in reading and writing. Student's progress, once Downey began providing him with specialized instruction, was so good that he eventually no longer needed a special education teacher to provide reading instruction to him. By fourth grade, Student was at grade level in reading and only required specialized academic instruction in writing and math.

*2010-2011 and 2011-2012 School Years: First and Second Grades*

SEPTEMBER 21, 2010 IEP TEAM MEETING AND NOVEMBER 23, 2010 ASSESSMENT PLAN

37. Student began attending first grade in September 2010 in Heidi Kendle's general education first grade class as his stay put placement. Student received speech and language therapy as previously implemented based on District's belief that Student's parents had not consented to that change in the IEP. Since Downey was not implementing the special education and goals from the proposed March 12, 2010 IEP, Student's education was based on Ms. Kendle's general education instruction that she provided to all her pupils.

38. Downey convened an addendum IEP team meeting for Student on September 21, 2010. Downey IEP team members continued to have concerns about Student's ability to make meaningful progress in a general education classroom. Although Student's parents again requested that his IEP be modified to include a full-time placement in general education, Downey once again offered the special education placement and services that it offered in the March 12, 2010 IEP. In a letter dated April 9, 2011, Student's mother, through her attorneys, again consented to the description of Student's disabling condition, the speech and language therapy services, offer of extended school year, and the goals and objectives carried over from the March 12, 2010 IEP offer. She again declined Downey's offer of a special day class placement for Student. Because neither Student's mother nor her attorney would sign the IEP document, Downey again declined to implement the proposed IEP.

39. Ms. Kendle testified that she could provide instruction in the areas covered by the proposed IEP goals. However, it is clear from Student's continued anxiety, lack of focus, distractibility, and need for individualized instruction, that he required specialized academic instruction by a special education teacher. Ms. Kendle was not trained to provide that type of instruction or address Student's unique educational needs. As stated above in Factual

Finding 36, Ms. Helm's opinion that Student's goals could not be implemented by a general education teacher was supported by the fact that Student has required specialized academic instruction from a qualified special education teacher even after Downey agreed to provide a placement primarily in general education. Student did not make meaningful academic progress in writing and reading until he began receiving the specialized instruction. Once he did, his progress was so significant that he eventually reached grade level in reading and no longer required reading instruction from a special education teacher.

40. With regard to speech and language, Student continued to receive two, 20-minute therapy sessions a week. Speech and language pathologist Angela Ross<sup>7</sup> provided the services. She has provided speech and language therapy to Student since he was in first grade. She was unaware that Downey believed that it did not have consent to the goals in the March 12, 2010 IEP, and she therefore implemented the three new speech and language goals. However, Ms. Ross was not directed to change the amount of Student's speech and language services, and therefore did not provide the three, 15-minute sessions offered in the new IEP.

41. Student alleges that the failure to provide him with the five additional minutes a week of speech and language therapy was a material failure to implement his IEP. However, he failed to provide any persuasive evidence in support of that contention. Ms. Ross testified that five minutes a week would not have made a difference in Student's progress in speech. Her testimony was bolstered by the fact that, as discussed below, by March 2013, when Ms. Ross assessed Student, his scores on all aspects of articulation, and receptive and expressive speech were in the average range and he no longer qualified for speech and language services in those areas. Other than the lay opinion of his mother that Student continued to have speech and language deficits, Student presented no evidence that contradicted Ms. Ross's testimony.

42. On November 23, 2010, Downey sent another assessment plan to Student's mother, proposing to administer assessments in the following areas: a) social emotional development; b) psycho-motor development; c) motor performance/ physical fitness; d) speech and language; e) functional behavior; and f) audiology. Student's mother, through her attorney, gave full consent to the assessments in a letter dated December 10, 2010.

43. Because neither Student's mother nor her attorney signed the assessment plan document, Downey believed it did not have consent to assess, so it did not administer the assessments. As stated above, it did not assess Student again in the areas of speech and language, social and emotional development, or psycho-motor development and perception

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<sup>7</sup> Ms. Ross is a licensed speech and language pathologist who has worked for Downey for nine years. She has a master's degree in special education and administration, and another master's degree in communication disorders.

until February and March 2013, when it administered a triennial assessment to him. To date, Downey has not administered the agreed-to assessments in the areas of motor performance/physical fitness, functional behavior, or audiology. Downey has also failed to assess in the area of autistic-like behaviors, which was proposed in the March 22, 2010 assessment plan and agreed to by Student's mother on March 25, 2010.

#### MAY 6, 2011 IEP TEAM MEETING AND MAY 6, 2011 ASSESSMENT PLAN

44. Downey convened an annual IEP team meeting for Student on May 6, 2011. Student continued to have expressive language deficits in articulation, use of the past tense, verbs, possessives, plurals, and language concepts. However, he had made progress in speech. Student's IEP team developed three new speech goals for him to address his difficulties with producing sounds at the end of words, understanding of language and grammar concepts, and understanding of concepts such as "before" and "after".

45. Student was still a year or more below grade level in reading. Student's IEP team carried over one of the previous reading goals: segmenting consonant-vowel-consonant words. Student's IEP team revised the other reading and writing from Student's March 12, 2010 IEP

46. Student had made progress in math and was at grade level. His IEP team therefore developed new math goals for him.

47. Based on Student's mother's continued opposition to placing Student in a special day class, the Downey IEP team members did not again recommend that type of placement. Rather, they recommended Student remain in a general education placement, but with pull-out specialized academic instruction in reading for an hour a day, and push-in specialized academic instruction in math and written language, 40 minutes a day, for the remainder of first grade and for second grade the following school year. The Downey team also proposed providing Student with a Senior Instructional Assistant for three and a half hours a day in the general education classroom. The Downey IEP team members believed that Student no longer qualified for special education eligibility as speech and language impaired, and therefore deleted it as the secondary eligibility category for him. The team offered Student three, 20-minute sessions of speech and language therapy per week to address his continuing speech deficits. Student's mother did not object to the change in eligibility classification.

48. Student's mother still had continuing concerns about Student's coordination, behaviors in class and lack of friends. Downey agreed to administer assessments to Student in the areas of occupational therapy and functional behavior, including social skills. Based upon the concerns she had about Student's inability to tolerate noise, Downey agreed to administer an audiology assessment.

49. Student's mother fully consented to the May 6, 2011 IEP offer by signing a letter dated May 9, 2011, sent by her attorney to Downey. Downey implemented the IEP as of the date of the letter, and immediately began implementing the new goals, provided Student with a one-on-one instructional assistant, and began providing him with specialized academic instruction.

50. Student's mother consented to the May 6, 2011 assessment plan through the same letter from her attorney to Downey, but neither Student's mother nor her attorney signed the assessment plan itself. Downey eventually administered an occupational therapy assessment to Student on October 9, 2011. However, as stated above, it has never administered the audiology or functional behavior assessments to Student that it offered on May 6, 2011, and never administered the previously offered assessments in the areas of autistic-like behaviors or motor development/physical fitness.

51. In the initial due process hearing in these consolidated cases, one of Downey's issues for hearing was whether its March 22, 2010 and November 23, 2010 assessment plans were appropriate and could be administered even without direct written consent from Student's parents. Downey prevailed on that issue. In the Decision, OAH informed Downey that it could administer all the assessments, including social/emotional, speech and language, psycho-motor development, motor performance/physical fitness, functional behavior, autism, and audiology assessments, without the need to obtain written consent from Student's parents or legal representatives. Downey did not follow through and administer the assessments, at least until it conducted Student's triennial assessment in early 2013, when it administered the psycho-educational and speech and language assessments as part of the triennial IEP process.

52. Downey never offered any explanation to Student's mother for its failure to administer the assessments it offered to Student in the areas of functional behavior, motor performance/physical fitness, audiology, or autistic-like behaviors, other than the fact that neither she nor her attorney had signed the actual assessment plan document.

53. Downey did not offer any explanation during the hearing on remand, or in its closing brief, for its failure to administer the assessments, even after prevailing on the issue during the underlying hearing, and even after the District Court determined in September 2012 that Student's mother had, in fact, consented to them. Downey had not administered the four assessments at issue as of the date of the hearing on remand.

#### IEP TEAM MEETINGS OF OCTOBER 14 AND DECEMBER 14, 2011, AND JANUARY 2012

54. General education teacher Trisha Cox-Nichols taught Student's second grade class. Student's strength had been, and continued to be, in math. He struggled with reading in second grade but made tremendous progress during the school year through the instruction of special education teacher David Cid, who provided Student with specialized academic instruction from the end of first grade to the end of fourth grade. Although Student started

second grade reading at the end of Kindergarten level, by the end of the school year Student was reading at grade level. Ms. Cox-Nichols had no difficulty understanding Student's speech. Student did not act out in class and interacted well with his peers.

55. Student's IEP team met again on October 14, 2011, to discuss the results of Student's occupational therapy assessment. At that time, with the consent of Student's mother, Student's IEP team amended his May 6, 2011 IEP to add occupational therapy goals, services and accommodations.

56. At the request of Student's mother, his IEP team met again on December 14, 2011. Student's mother believed Student was not progressing in reading and was exhibiting inappropriate behaviors at school. However, in spite of these concerns, Student had already met or exceeded his goals for segmenting consonant-vowel-consonant words, reading 150 high frequency words, reading a passage at a beginning first grade level with visual supports, telling time, and adding and subtracting two to three digit numbers. He had made some progress on legibly creating four to five word sentences. Downey therefore did not propose modifications to Student's placement or services.

57. Downey convened an annual IEP team meeting for Student on January 30, 2012, in the middle of Student's second grade year. Student's reading had progressed to the level of the end of first grade, but he still had difficulties with written language. Math remained a strong point for him. He continued to make progress on grammar and concepts in speech, but still had trouble with "th" sounds. Student demonstrated good behavior in the classroom. Student's IEP team revised his goals based on his progress, adding new goals where appropriate. Based upon Student's continued progress, Downey offered the same placement in a general education classroom, with the same specialized academic instruction and aide support as had been offered in Student's May 6, 2011 IEP. Student's mother consented to the IEP, which Downey then implemented.

#### *2012-2013 and 2013-2014 School Years: Third and Fourth Grade*

##### FEBRUARY AND MARCH 2013 TRIENNIAL ASSESSMENT

58. Student's teacher for third grade was Mary Dagani. Student was average in math, but was slightly below grade level in reading and writing. Although Student was a typical third grader in most respects, he did have coordination problems and appeared clumsy at times, often needing support to get up from the floor. Student also had difficulty in physical education doing things like jumping jacks and handling balls. Student's behavior with Ms. Dagani was respectful. However, Student was disrespectful to his instructional aide, often becoming argumentative with her. Student would sometimes refuse to do his lessons, which had a negative effect on his grades. In spite of these issues, Student made considerable progress in third grade. He entered third grade at a basic level in some areas but finished at a proficient level. Student's grades also went up by the end of the school year.

59. On November 29, 2012, about two months after the District Court issued its tentative decision in this case, Downey sent another assessment plan to Student's mother. It proposed administering assessments to Student in the areas of academic/pre-academic performance, social/emotional status, speech and language, cognitive processing, and occupational therapy for Student's triennial assessment. These assessments encompassed the social/emotional and speech and language assessments that Downey had previously offered to administer but had not yet done. Student's mother signed the assessment plan document on February 4, 2013.<sup>8</sup>

60. Downey school psychologist Patricia Fuentes<sup>9</sup> administered the psycho-educational assessment. She discussed the results of her assessments in a report dated March 21, 2013. Ms. Fuentes administered several standardized testing instruments as part of her assessment, reviewed Student's records and reports from his teachers, and had his general education teacher and specialized academic instruction teacher complete rating scales concerning Student's behavior. Ms. Fuentes assessed Student's cognition as well as his academic achievement and facets of behavior.

61. Student's scores demonstrated improvement in most areas of cognition and academic achievement. While Student had scored in the low average to average range on cognition testing in 2009, his full scale intelligence score on Ms. Fuentes's assessment was 110, in the high average range. Although Student still had some difficulties with written language and academics at school, his scores on the academic achievement testing were all in the average to high average range as well, with the exception of spelling, in which Student scored in the low average range. Student's scores on the adaptive skills assessments were age appropriate. Commensurate with his behavior scores on his 2009 assessments, Student continued to exhibit behaviors supporting a finding of attention deficit hyperactivity disorder, which impacted his educational performance.

62. Other than the fact that Student scored somewhat higher in cognition and academic abilities than he had in 2009, there was little difference between the results of his 2009 psycho-educational assessment and the assessment Ms. Fuentes administered in March 2013. There was no new information that could form the basis for finding Student eligible for special education under different or additional categories, and no information that would support the belief of Student's mother that Student was not making educational progress. The assessment did not indicate any new unique needs for Student and did not indicate that he was not making progress. Although Student's mother testified that Downey's delay in

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<sup>8</sup> The occupational therapy assessment is not at issue in this hearing and will therefore not be discussed.

<sup>9</sup> Ms. Fuentes has worked for Downey for nine years. She has a master's degree in school psychology and her pupil personnel services credential.



administering the psycho-educational assessment affected her ability to participate in Student's IEP process, she gave no persuasive reasons for her belief. Nor did Student provide any evidence that there would have been different information gathered had Student been assessed earlier, or that an earlier assessment would have indicated that Student needed a different placement or additional services.

63. Ms. Ross administered a speech and language assessment to Student in February and March 2013 as part of his triennial assessment. Student's scores on this assessment were significantly higher than on his 2008 and 2010 speech and language assessment. On the earlier assessments, Student had demonstrated moderate to severe expressive language deficits, with delays in articulation and phonological skills. However, Student's expressive language skills had improved significantly by the time Ms. Ross conducted her assessment in 2013. Student scored in the average range for articulation, and well into the average range for expressive and receptive language on each of the several testing instruments Ms. Ross utilized to assess him.

64. Based upon Student's strong results on all facets of her assessment, Ms. Ross recommended that Student be exited from speech and language services because he no longer qualified for them.<sup>10</sup> Student contends that he lost educational benefit because of the delay in the speech and language assessment and that his mother's ability to participate in his IEP process was impeded. However, Student provided no evidence of this at the underlying hearing and no evidence of this at the hearing on remand, other than his mother's lay testimony. In agreeing to assess Student in the area of speech and language in March 2010, Downey had only agreed to administer two additional subtests of one standardized assessment. There was no evidence that the delay in doing two subtests of one test caused Student a loss of educational benefit. The evidence is, in fact, to the contrary. Student was making significant progress in speech, to the extent that his scores were in the average range on all portions of the assessment. There is thus no evidence that he lost educational benefit by Downey's delay in providing the two subsets of the speech and language assessment.

#### JUNE 10, 2014 TRIENNIAL IEP TEAM MEETING

65. Student was in fourth grade during the 2013-2014 school year, in general education teacher Denise Danner's class. Student had made great academic strides to this point through the specialized academic instruction in math, reading, and writing. By the time Student was in third grade, he no longer needed specialized reading instruction and thereafter only received specialized instruction in math and writing. Student made significant progress

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<sup>10</sup> At the hearing on remand, Student attempted to raise disputes with Ms. Ross's assessment. However, Student has never filed a due process request to contest her assessment or her recommendations, and any issues concerning the validity of the assessment or the recommendations were not properly before the ALJ in this hearing. The ALJ therefore did not take evidence on the validity of Ms. Ross's assessment.

in his ability to decode written language, his ability to understand the rules of phonics and to apply those rules to his reading. By fourth grade, Student made gains in literal comprehension and listening skills. From first to fourth grade, Student's writing progressed from being able to write words, to writing basic sentences, to being able to write paragraphs. He still struggled with spelling, grammar, organizational skills, and with the motivation to write well. Student was capable of working at grade level even in his writing, but his grades sometimes were lower than expected because he was often absent from school (one year he was absent 33 days).

66. Between March 2013, when Downey completed its triennial assessment, and June 2014, Downey attempted eight times to convene a triennial IEP team meeting to discuss the assessment and develop a triennial IEP for Student. Student's mother did not agree to attend a meeting until the ninth attempt, and the meeting finally took place on June 10, 2014, 15 months after the assessment was completed.

67. The IEP team discussed the results of Student's assessments. Student had met all his speech and language goals and had not demonstrated any articulation or expressive and receptive language deficits on the speech and language assessment. However, the IEP team recommended that Student continue to receive speech and language therapy based upon concerns raised by Ms. Danner, who noted that Student's pragmatic skills were deficient.

68. Although Student's scores on the writing portions of his psycho-educational assessment were all in the average range, his in-classroom writing performance needed guidance. His IEP team therefore developed a goal to address his deficits in writing. Although Student's scores in mathematics were average to high average on his academic assessment, Student had almost failed the fractions unit in class. His IEP team therefore developed a goal to address that deficit. The team also developed a goal to address Student's reading comprehension, a goal to foster more independence, and two goals to address his occupational therapy needs.

69. Downey's IEP offer to Student consisted of continued placement in general education with aide support for three-and-a-half hours a day, specialized academic instruction in reading, writing, and math for a portion of the day, occupational therapy services, and speech and language services to address Student's needs in pragmatic language. It is unclear from the record when and if Student's mother consented to the IEP.

#### *2014-2015 School Year: Fifth Grade*

70. At the time of the hearing on remand, Student was finishing fifth grade in Deborah Hoetker's general education class. Student was at grade level for reading, vocabulary, and comprehension. He still was below grade level in spelling and writing. Student continued to have difficulty staying on task and often required prompting from his

aide, whom he still treated disrespectfully at times. However, Student provided no persuasive evidence that Downey's delay in administering the psycho-educational and speech and language assessments, or failure to assess him in the areas of audiology, behavior, autistic-like behaviors, or motor development have affected his progress.

71. Student's mother continued to have concerns about Student's speech, although Ms. Hoetker believed that his articulation difficulties stemmed from his tendency to speak too rapidly. As of the hearing on remand, Student still did not make friends easily and did not have play dates with other boys his age. Student did not, and never has, participated in organized sports because of what his mother sees as his physical limitations.

### *Compensatory Education*

72. Student requests 92 hours of counseling services as compensatory education for Downey's three-year delay in administering a psycho-educational assessment. Student bases this amount on the testimony of his mother, who believes that had Downey timely assessed him, he would have been provided with 30 minutes a week of counseling services. Student's IEP's have never included counseling services. Student provided no persuasive evidence to support this request. Although Ms. Fuentes recommended counseling in her March 2013 assessment report, the Downey IEP team members ultimately did not believe it necessary. Other than the lay opinion of Student's mother, there was no evidence to support a finding at this point that Student required counseling to access his education.

73. Student further requests 92 hours of academic tutoring to compensate him for any loss of instruction occasioned by Downey's failure to implement the goals in his March 12, 2010 IEP, a period of approximately 14 months, and its delay in administering the psycho-educational assessment, as well as its failure to provide him with a functional behavior assessment. Student provided no evidence in support of this request at either the underlying due process hearing or the remand hearing, other than the testimony of his mother, who stated she believed that 92 hours of tutoring in unspecified subjects would help Student to progress more educationally. Student's mother has no background in education, psychology, or behavior. Her testimony, while sincere, does not provide a basis for the compensatory education request.

74. Student also requests 92.5 hours of adaptive physical education services for Downey's failure to assess him in the area of physical fitness. Student provided no evidence at either hearing, other than his mother's lay testimony, to support a present need for adaptive physical education, or for the specific amount of services he requested. Since Student has never been found eligible for adaptive physical education, and no one proficient in that area testified to any unique need Student might have, it is unclear how Student arrived at the amount of compensatory education requested.

75. Finally, Student requests eight and one half hours of compensatory speech and language services to compensate for Downey's failure to implement the five minutes per week of additional speech and language therapy services offered in Student's March 12, 2010 IEP, and delay in assessing him in speech and language. Student provided no evidence at either hearing in support of the requested amount of compensatory speech and language services.

#### *Expansion of the Hearing on Remand*

76. The District Court Order on Remand gave discretion to the ALJ to permit the record to be supplemented as necessary on remand.

77. During the first hearing, the ALJ found that Student had failed to provide any evidence whatsoever of any loss of educational benefit from Downey's failure to assess him. Student also failed to present any evidence at the first hearing that the failure to implement his IEP's was material. Student maintains that he should have been allowed to supplement the record but gave no reason as to why he failed to present this evidence at the first hearing, when it would have been fresh, or what he could have presented at the hearing on remand, which took place over four to five years after the fact, to address those issues. At the hearing on remand, Student was given the opportunity to present persuasive evidence of whether he continued to suffer a loss of educational benefit based on Downey's delay or failure to assess him in six areas. However, Student failed to present any evidence of a loss of educational benefit in those areas. Nor did Student provide any persuasive argument for expansion of the record in his closing brief. There was thus no compelling reason to expand the record more than that which the ALJ permitted during the instant hearing on remand.

### LEGAL CONCLUSIONS

#### *Introduction – Legal Framework under the IDEA<sup>11</sup>*

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>12</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that

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<sup>11</sup> Unless otherwise indicated, the legal citations in this introduction are incorporated by reference into the analysis of each issue decided below.

<sup>12</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

*Scope of Consent to the March 12, 2010 and September 21, 2010 IEP's and March 22, 2010, November 23, 2010, and May 6, 2011 Assessment Plans*

5. In its closing brief, Downey conceded that Student's mother, through her attorney, gave clear and unambiguous consent to implement the description of Student's disability, the speech and language services, and the goals and objectives offered in Student's March 12, 2010 and September 21, 2010 IEP's. The evidence supports this concession.

6. The parties stipulated to the fact that Downey did not implement the portions of the IEP's to which Student's mother had consented, until Downey offered another IEP on May 6, 2011, to which Student's mother consented in full. However, the evidence at hearing, through the testimony of speech and language pathologist Angela Ross, supports a finding that Downey did implement the speech and language goals from the IEP's. Ms. Ross was apparently unaware that Downey at the time disputed that Student's mother had given her consent to implement them.

7. The parties also stipulated that Downey had agreed to administer speech and language, psycho-educational, audiology, functional behavior, autistic-like behavior, and motor development/ physical fitness assessments to Student in different assessment plans dated March 22, 2010, November 23, 2010, and May 6, 2011. The parties stipulated that Student's mother consented to the assessments through letters from her attorney to Downey shortly after Downey sent her the assessment plans.

8. The parties stipulated, and the evidence supports, that Downey did not administer the two speech and language subtests or the psycho-educational assessment to Student until Downey conducted Student's triennial assessment in February and March of 2013.

9. The parties stipulated that as of the date of the hearing on remand, Downey had not ever administered audiology, functional behavior, autistic-like behavior, or motor development/physical fitness assessments to Student.

*Downey Was Unable to Implement the Instructional Goals in Student's March 12, 2010 and September 21, 2010 IEP's*

10. Although Student's mother consented to the instructional goals offered in the two IEP's at issue, because she would not consent to placement of Student in a special day class as Downey had offered, Downey would not have been able to implement the goals. The evidence supports Downey's contention that the goals were developed to address Student's need for individualized instruction, in a classroom led by a credentialed special education teacher, who would provide the structure that Student needed to address his lack of focus, distractibility, and language deficits. The testimony of Ms. Helm, who had over 30 years of experience as a special education teacher and administrator, was persuasive that general education teachers would not have had the experience, training, or time to implement the goals in their classrooms of 25 to 30 pupils. Downey's contention is reinforced by the fact that even after Downey agreed to maintain Student in a general education classroom for the majority of his school day, all of Student's instructional goals to date have been implemented by a special education teacher. The special education teacher provided services directly to Student either in Student's classroom or in a special education classroom. Student would not have been able to make the progress he did in reading, math and writing, had Downey not provided specialized academic instruction through a credentialed special education teacher. Although some of the goals were covered by state standards for Kindergarten and first grade, and Student's general education teachers would have been able to cover some of the areas – and in fact did so – the teachers were not trained to provide the specialized academic instruction needed to address the goals as written. The evidence therefore does not support Student's contention that his general education teachers could have implemented the goals and that he would have been able to make meaningful educational progress on the goals solely in the general education classroom.

*The Failure to Provide Student with the Additional Five Minutes Per Week of Speech and Language Therapy Was Not a Material Failure to Implement his IEP's*

11. At the time of Student's March 12, 2010 IEP team meeting, Student was receiving two, 20-minute sessions of speech and language therapy per week. The parties do not dispute that Downey offered to change that to three, 15-minute sessions per week. Student contends that the failure to provide him with the additional five minutes per week of speech services amounted to a material failure to implement his IEP.

12. When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly

short of the services required by the child's IEP.” (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). The materiality standard of *Van Duyn* does not require that the child have suffered “demonstrable educational harm” to prevail, although a child's progress or lack of progress may be probative on the issue of whether the failure to implement was material. (*Ibid.*) The court cautioned that nothing in its decision was intended to weaken a school's obligation to provide services in accordance with an IEP. (*Ibid.*) However, the court also stated that “There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” (*Id.* at p. 821.)

13. The evidence does not support Student's contention. First, the five-minute discrepancy amounted to only about 11 percent of the 45 minutes of speech and language services to which Student's mother had consented. This is far less than the more than 50 percent of mathematics instruction the child in *Van Duyn* lost as a result of his school district's failure to implement portions of his IEP.

14. Although the court in *Van Duyn* made a specific finding that a child does not have to demonstrate that he or she suffered educational harm to prevail, the court also noted that a child's progress or lack of progress might indicate whether the failure to implement was material. In this case, the evidence strongly supports a finding that Student made significant progress in speech and language over the course of his attendance at Downey. Speech and language impairment was Student's initial disabling condition when Downey first found him eligible for special education. Student's progress on his speech goals was so substantial that Downey was able to eventually delete speech and language impairment as an eligibility category. By March 2013, Ms. Ross's speech and language assessment of Student indicated that his articulation and expressive and receptive speech had progressed to the average range, making Student ineligible for services in those areas.

15. The evidence therefore does not support Student's contention that the loss of five minutes per week of speech and language services was more than a minor implementation failure. Downey did not materially fail to implement Student's speech and language services between March 12, 2010, when it made the offer of services, and May 6, 2011, when it implemented its newest IEP offer to Student.

#### *Downey Did Not Materially Fail to Implement Other Portions of Student's IEP's*

16. The only other aspect of Student's March 12, 2010 and September 21, 2010 IEP's that is at issue in this case is the failure to implement the proposed goals from the IEP's. As discussed above, Ms. Ross did implement the new speech and language goals. Student provided no evidence to the contrary.

17. The parties dispute whether Downey could have implemented the instructional goals to which Student's mother consented. Ms. Overturf and Ms. Kendle both testified that they could have provided instruction to Student in the subjects covered by the goals.



However, although they are excellent general education teachers, they do not have the education or training to provide specialized academic instruction to children with disabilities. During Kindergarten and first grade, Student required a structured environment with individualized instruction from a trained special education teacher based on his distractibility, lack of focus, and difficulty progressing in academics. His need for this type of instruction was underscored by the fact that even when his IEP team agreed to maintain his placement primarily in general education, Student required individualized instruction from a special education teacher in math, reading, and writing, to progress. Student's mother declined the offer of a special education classroom where the proposed goals could have and would have been implemented. The preponderance of the evidence supports the conclusion that Downey would not have been able to implement the goals in the general education classroom.

18. Given that Downey could not have implemented the instructional goals in the general education classroom, its failure to do so was not a material failure of implementation as contended by Student.

#### *Downey's Failure to Assess*

19. In response to requests for assessment by Student's mother, Downey offered to assess Student through three assessment plans, the first dated March 22, 2010, the second dated November 23, 2010, and the third dated May 6, 2011. Downey did not offer to assess Student in every single area requested because it did not have any reason to believe that Student might have unique needs in the areas it declined to assess.

20. Through the three assessment plans, Downey agreed to administer assessments in the areas of psycho-educational, speech and language, functional behavior, autistic-like behavior, audiology, and motor development/physical fitness. Downey administered psycho-educational and speech and language assessments to Student as part of his triennial assessment in February and March 2013. It has never assessed Student in the remaining four areas in which it had agreed, in sometimes more than one assessment plan, to administer assessments.

21. Downey's failure to assess is a procedural violation of the IDEA and the California Education Code. However, not all procedural violations under either federal or state law constitute a substantive denial of FAPE. The procedural violation is only actionable if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused the child a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

## PSYCHO-EDUCATIONAL AND SPEECH AND LANGUAGE ASSESSMENTS

22. Student has failed to prove, by a preponderance of the evidence, that he suffered any denial of FAPE or loss of educational benefits based upon Downey's delay in assessing him. Downey administered a psycho-educational assessment in November 2009 at the request of Student's mother. The assessment confirmed Student's unique needs, particularly his distractibility and lack of focus in class. Downey did not administer a psycho-educational assessment to Student again until his March 2013 triennial. Between those dates, Downey continued to fine tune Student's educational program, ultimately offering a general education placement with specialized academic instruction supports, along with the support of a one-on-one aide, from the May 6, 2011 IEP to the present. As Student made advancements, such as improving his reading to grade level, Downey revamped his program to meet Student's then present needs.

23. Downey's March 2013 psycho-educational assessment did not identify any new unique needs that might have been discovered had the assessment been done earlier. To the contrary, the March 2013 assessment emphasized the strides Student had made in all academic areas tested. Student's academic scores were higher than those he attained in 2009, and his cognition scores were higher as well.

24. Student argues in his closing brief that he would have made more progress had Downey administered the psycho-educational assessment in a timely fashion, but points to no concrete or persuasive evidence that supports his argument. It is unclear exactly what Downey would have or could have done differently with regard to Student's program had it assessed Student earlier. Student has therefore failed to meet his burden of proof that he suffered a loss of FAPE or loss of educational benefit due to the untimely psycho-educational assessment.

25. Downey provided Student with a speech and language assessment at his mother's request in February 2010. Ms. Smith assessed Student in February 2010. Her assessment noted that at the time, Student demonstrated significant speech deficits, most notably in expressive speech and articulation. Based upon her assessment, Downey continued to provide Student with weekly speech and language therapy sessions. In spite of the lack of supporting assessment, Downey offered to increase the amount of weekly therapy to 60 minutes a week in its May 6, 2011 IEP offer. Ms. Ross then conducted a speech and language assessment as part of Student March 2013 triennial. Student's scores in March 2013 demonstrated that he had advanced considerably in his articulation and receptive and expressive language abilities. As of March 2013, Student tested in the average range in all areas of speech and no longer required speech and language therapy to address those former areas of deficit. The evidence thus demonstrates that Downey provided increased services to Student during the three years between the two assessments, services that an earlier

assessment might have determined were no longer necessary. Contrary to Student's assertion, the evidence therefore demonstrates that Downey did not deny Student a FAPE and Student did not suffer a loss of educational benefit by Downey's delay in providing two subtests of a speech and language assessment to Student.

26. Student also has failed to provide persuasive evidence that his mother's ability to participate in his IEP process was significantly impeded by the delay in providing him with the speech and language subtests or the psycho-educational assessment. Student has failed to show what information his mother would have had that would have changed or influenced her participation or what she would have requested for Student had Downey administered the assessments earlier. For these reasons, Student has failed to meet his burden of persuasion that Downey committed a procedural violation when it delayed providing him the speech and language subtests and the psycho-educational assessment.

FUNCTIONAL BEHAVIOR, AUTISTIC-LIKE BEHAVIOR, AUDIOLOGY, AND MOTOR DEVELOPMENT/PHYSICAL FITNESS ASSESSMENTS

27. In spite of having offered to assess Student in the areas of functional behavior, autistic-like behavior, audiology, and motor development/physical fitness, in some cases in more than one assessment plan, Downey failed to administer the assessments to Student. It is perplexing why Downey failed to do them given the fact that it filed for due process to assess Student without his mother's consent, failed to assess when given authority to do so by the ALJ, and still failed to administer these four assessments after the District Court found that Student's mother had consented to them. Downey has not offered any explanation for this failure.

28. Student contends that as a consequence of the failure to assess him in these four areas, he suffered and continues to suffer a loss of educational benefit. In the area of functional behavior, he points to the fact that he has had difficulty playing with other children since he was in first grade, that throughout his school career he was often frustrated in class, gave up easily when work was too difficult, and continued to be distractible and unfocused at school. Student points to the fact that Ms. Fuentes acknowledged that her normal procedure with children who had been diagnosed with attention deficit disorders, who were not taking medication, such as was the case with Student, was to administer a functional behavior assessment.

29. However, the flaw in Student's argument is that the evidence only indicates that Student *may* have unique needs that a functional behavior assessment *might* identify. Students presented no persuasive evidence that he actually has such needs, or that a functional behavior assessment would, in fact, identify them. Student presented no persuasive evidence of an actual loss of educational benefit that was the result of the failure to assess.

30. Student likewise argues that he has autistic-like behaviors, such as throwing tantrums, not getting along with peers and getting frustrated easily. Student is correct that he exhibits these behaviors, which have been noted by some of his teachers, Ms. Fuentes, and his aide. However, Student pointed to no evidence in support of his argument that the failure to assess those behaviors has caused him a loss of educational benefit.

31. Student's mother, as well as some of his teachers, have noted that he has an unusual gait, that he cannot walk properly at times, and that he has poor coordination. Student jumps to the conclusion that because of these deficits, he has suffered a continuing loss of educational benefit because of Downey's failure to administer a motor development/physical fitness assessment to him. However, there is no evidence in the record of what exactly Student has lost by the lack of the assessment.

32. Likewise, although Student points to situations over the years where he has shown sensitivity to sounds at school, such as loud noises or music, Student did not present any evidence of what educational benefit he has lost because of this sensitivity.

33. In all four circumstances, Student failed to provide any persuasive evidence that the failure to assess him denied him a FAPE or resulted in a loss of educational benefit. Student did not provide the results of any assessments that might have supported his contentions and offered no expert testimony identifying his needs or his alleged loss of educational benefit.

34. Student did provide evidence that he *may* have unique needs in the areas of behavior, audiology, and/or motor development that *might* be identified through the assessments Downey offered him. It cannot be refuted that Downey offered the assessments in the first place because there was some evidence that Student might have unique needs in those areas that could only be determined through the assessment process. Downey went so far as to obtain an order from OAH permitting it to conduct these assessments when it believed it did not have proper consent to assess. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Student has demonstrated that he may have deficits in the areas of behavior, motor development, and audiology, which Downey was aware of to the extent that it offered to conduct the four assessments at issue, and which Downey should have administered.

35. Because of the need to assess in these areas, Downey's failure to provide the assessments to Student has prevented Student's mother from having necessary information about him. Unlike the situation with the delayed psycho-educational and speech and language assessments, Student's mother has never been provided with information concerning whether Student actually has unique needs in the areas of behavior, motor development or audiology that affect his access to his education and which Downey should be addressing. Student's mother cannot discuss areas of potential need if assessments are not done. She cannot validly request services or programming if no assessment has determined

the existence or extent of a need. Student has therefore met his burden of persuasion by a preponderance of the evidence that Downey should have provided him with the four assessments it agreed to do and that his mother's ability to participate fully in his IEP process was significantly impeded by the failure to provide the four assessments.

### *Remedies*

36. As stated above, Student requested 92 hours of compensatory education in the form of tutoring, 92 hours of counseling, 92.5 hours of adaptive physical education, and eight and half hours of speech and language services as compensatory education for Downey's alleged failure to implement his IEP's and delay and/or failure to assess him per his assessment plans.

37. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) There is no obligation to provide day-for-day compensation for time missed. The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (*Ibid.*) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996].)

38. Student has failed to prove by a preponderance of the evidence that Downey materially failed to implement his IEP's. He has also failed to prove by a preponderance of the evidence that he has suffered any loss of educational benefit based on Downey's failure to timely provide him with psycho-educational or speech and language assessments, or to ever assess him in the areas of functional behavior, autistic-like behaviors, motor development/physical fitness, or audiology. Significantly, even had Student proven a loss of educational benefit, he failed to provide any evidence whatsoever in support of his specific requests for compensatory education and services, other than the lay opinion of his mother.

39. However, Student has demonstrated that he may have unique needs in the four areas in which Downey failed to assess him. He has also proven by a preponderance of the evidence that his mother's ability to participate in his IEP process as it related to those four areas of suspected need was impeded by the lack of assessment. Since the assessments were never completed, Student's mother has never been informed of the possible existence or extent of these needs, or whether and to what extent those needs might be affecting Student's ability to access his education.

40. The appropriate remedy for a failure to assess an area of potential need is to order Downey to provide the assessments. Downey was given many opportunities to provide the assessments. It prevailed at the first hearing in its request that the ALJ issue an order permitting it to assess Student without the written consent of Student's mother. Downey failed to perform the assessments after prevailing on the case. It then had another

opportunity to assess after the District Court issued its tentative order in 2012 finding that Student's mother had given consent to the assessments, but still failed to perform the four assessments. Finally, Downey could have begun the assessment process after the District Court remanded this case to OAH in January 2015. However, as of the date of the hearing on remand, Downey still had not administered the four assessments to Student.

41. Remedies ordered by ALJ's in due process hearings are equitable in nature. Given Downey's failure to assess despite the many opportunities it had to so, and its lack of any explanation for its failure to perform the assessments, the equitable remedy in this case is to order Downey to fund independent assessments with the independent assessors of Student's choice, as long as they meet Downey's stated criteria for independent assessments, or the stated criteria of the Special Education Local Plan Area to which Downey belongs.

### ORDER

1. Downey shall provide Student with independent assessments in the areas of autistic-like behaviors, audiology, functional behavior, and motor development/physical fitness, using assessors of Student's choice.

2. Student's choice of assessors must adhere to the criteria for independent assessors established either by Downey's rules and regulations or those established by the Special Education Local Plan Area to which Downey belongs, including maximum amount of fees to be paid to the assessors. If Student's choice of assessor charges more than that permitted under either Downey's criteria or that of its Special Education Local Plan Area, Student shall be responsible for the excess costs and/or fees.

3. If the assessor(s) meet the criteria of Downey or its Special Education Local Plan Area, Downey shall contract with the assessor(s) within 30 days of receiving written notification from Student's parents or attorney of the assessor's name, address, telephone number, fees, and qualifications to do the assessment.

4. Downey shall convene an IEP team meeting for purposes of reviewing the assessment(s) within 30 days of receiving a copy of the assessment report(s). Downey shall pay each assessor for up to two hours of their normal hourly fees for the assessor to participate in the IEP team meeting. The two hours shall encompass costs for travel time. At Student's discretion, the assessors may participate telephonically at the IEP team meeting. Whether the assessor travels to the IEP team meeting or participates by telephone, Downey shall only be responsible for paying up to two hours of the assessor's hourly fees.

5. Downey shall not be responsible or required to provide additional independent assessments for any of these four areas of assessment should Student's parents disagree with the assessments.

6. All other relief requested by Student is denied.

### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on issue three. Downey prevailed on issues one, two, and four.

### RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: June 26, 2015

/s/  
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DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings